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No. 460

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE FALK CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Fitch, John A., <i>The Causes of Industrial Unrest</i> (1924) pp. 147 <i>et seq.</i>	30
Descohier, Don D., <i>History of Labor in the United States, 1896-1932</i> (1935), Vol. III, p. 354.....	30
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Twentieth Century Fund, <i>Labor and the Government</i> (1935), p. 79.....	30
U. S. Department of Labor, Bureau of Labor Statistics, <i>Characteristics of Company Unions</i> , Bulletin No. 634 (1935), p. 1938.....	30
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Witte, E., <i>The Government in Labor Disputes</i> (1932), p. 218.....	30
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The first opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 1198) is reported in 102 F. (2d) 383, and the second opinion (R. 1208) in 106 F. (2d) 454. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1165-1181) are reported in 6 N. L. R. B. 654.

JURISDICTION

The decree of the Circuit Court of Appeals was entered July 13, 1939. The petition for a writ of

certiorari was filed October 12, 1939, and was granted November 13, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, in ruling upon a petition by the National Labor Relations Board to enforce an order issued by the Board against respondent in an unfair labor practice proceeding under Section 10 of the National Labor Relations Act, the court below had jurisdiction so to modify the Section 10 order as to invalidate or modify a direction of election (not sought to be reviewed by either party) issued by the Board in a separate representation proceeding under Section 9 (c).

2. Whether, upon findings approved by the court below that respondent dominated and interfered with, and is dominating and interfering with, a labor organization of its employees in violation of the Act, it was within the power of the Board (1) to require respondent to withdraw all recognition from and completely to disestablish that labor organization as a bargaining representative of its employees, and (2) in a separate representation proceeding to direct an election in which the disestablished organization was to be omitted from the ballot.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are set forth in the Appendix.

STATEMENT

Pursuant to a charge and amended charge (R. 18-19, 20-21) filed by the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No: 1528, a labor organization, the Board on August 4, 1937, pursuant to Section 10 (b) of the Act, issued its complaint and notice of hearing, which were duly served upon respondent (R. 14-18). The complaint alleged, in substance, that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), (3) and (5)¹ of the Act. Respondent duly filed its answer (R. 21-25) denying that it had violated the Act.

At the same time that it filed the amended charge under Section 10 (b), the Amalgamated likewise filed a petition (R. 13-14) requesting the investigation of a question concerning the representation of respondent's employees asserted to have arisen under Section 9 (c). In this proceeding the Board ordered an investigation and authorized its Regional Director at Milwaukee, Wisconsin, to provide for an appropriate hearing upon notice (Bd. Ex. No. 1).¹

¹ This exhibit and Board Exhibit No. 2, hereinafter referred to, are not printed but are on file with the Clerk.

Thereafter, as permitted by its rules,² the Board ordered that the unfair labor practice proceeding against respondent under Section 10 and the representation proceeding under Section 9 (c) be consolidated for the purpose of hearing (Bd. Ex. No. 2). The consolidated hearing was held from August 16 to 25, 1937. The Board, respondent, the Independent Union of Falk Employees, and the International Union of Operating Engineers, Local 311, participated in the hearing by counsel (R. 26).³

On November 2, 1937, the Trial Examiner filed his Intermediate Report in the unfair labor practice proceeding (R. 1136-1152), finding that respondent had violated Section 8 (1), (2) and (3) of the Act.⁴ Exceptions were filed by respondent (R. 1153-1161) and by the Independent (R. 1161-

² Article III, Sec. 10, Rules and Regulations of the National Labor Relations Board—Series 1, as amended, issued April 27, 1936. The Board's present rules, "Series 2," issued July 14, 1939, do not change the provision for consolidation.

³ The Independent Union of Falk Employees, a labor organization alleged in the complaint to be dominated by respondent, and the International Union of Operating Engineers, Local 311, a labor organization claiming to represent some of respondent's employees, intervened (Bd. Exs. Nos. 6-9, R. 32, 33).

⁴ The Trial Examiner found that respondent did not violate Section 8 (5) (R. 1147). The Board affirmed this action and likewise dismissed the Section 8 (3) allegations (R. 1181). The Board's order (R. 1180-1181) involves only Section 8 (1) and (2).

1164), and on February 25, 1938, they and the Operating Engineers appeared before the Board by counsel and were heard in oral argument (R. 1165). Respondent and the Independent also filed briefs with the Board.

On April 18, 1938, the Board issued its Decision and Order in the unfair labor practice proceeding and its Decision and Direction of Election in the representation proceeding in consolidated form (R. 1165-1182). The Board's findings of fact may be briefly summarized as follows:³

Respondent produces and sells steel casings and related products, and is extensively engaged in interstate commerce (R. 1170; Dd. Exh. 16). (No question concerning the Board's jurisdiction is present here.) In 1933, a form of employee representation known as the Works Council was established at respondent's plant upon the advice of Harold Falk, respondent's vice president and works manager, who also warned the employees that it would be "inadvisable" for them to select an "outside union" as their representative (R. 1171, 43, 45). The Council, which continued for about 21 months after the Act became effective, was indisputably a company union. It was administered jointly by representatives elected by the employees and those designated by the management, and the superintendent of respondent's machine shop was its chairman (R. 1171, 45-46, 179). Re-

³ In the following statement the first record reference is to the findings of the Board and the succeeding references are to the evidence supporting those findings.

spondent's officers interfered with its elections to the extent of warning the employees not to vote for "outsiders," and votes cast in defiance of these instructions were disregarded (R. 1171, 505, 551-552). The meetings were held on company time and property and the employee representatives were paid for time spent at such meetings (R. 1171-1172, 161).

Respondent's high officials had an emphatic preference for "inside" labor organizations (R. 1175, 49, 90, 91, 97) and a decided antipathy to unions with national affiliations (R. 1171-1172, 1175, 40, 50, 51, 63, 71, 75). When respondent decided in April 1937 that the Works Council was illegal and the representatives were informed that it must be disbanded (R. 1171, 275, 306), Harold Falk clearly indicated to the representatives that they were expected to form a new unaffiliated organization (R. 1171, 508-509, 532). At the same time, Falk gave permission to hold a later meeting of all past and present Works Council representatives on respondent's premises (R. 1171, 510, 753, 810, 839). The Amalgamated and the Operating Engineers were then engaged in attempting to organize respondent's employees, to the "disappointment" of Falk (R. 1174, 477, 557, 558, 639, 942, 1014).

A number of the representatives on the company-dominated Works Council proceeded to form the Independent, thus carrying out Falk's desire that they form a new inside organization. Respondent's personnel manager delivered notices of the

first meeting, held on April 12; he regarded this function as "business connected with the company" (R. 1172, 213-220, 762-763).⁶ The meeting was held on company property during working hours and those who attended were paid by respondent for the time spent at that meeting, as well as at later meetings (R. 1172, 258, 301, 929-931).⁷ Falk accepted an invitation to attend and advised the representatives that they had a right to form their own union (R. 1172, 279-280, 756, 946). Falk had previously announced, at the meeting where the dissolution of the Work's Council was proclaimed to the representatives, that there would be a general wage increase on June 1 if no outside union intervened (R. 1171, 507, 837, 1007-1009). Someone suggested at the April 12 meeting that if the date of the wage increase were advanced it would keep the employees from joining the Amalgamated; Falk immediately advanced the increase to May 1 (R. 1172, 510, 557, 813-814, 829, 874, 950, 265).

⁶ Company messengers also delivered notices of the meeting to foremen, who passed them on to the selected employees (R. 220, 217). The foreman of the foundry, knowing the purpose of the meeting, appointed two employees to attend (R. 257-258).

⁷ After the Independent had been successfully organized and had been recognized by respondent as the employees' exclusive bargaining representative, these payments were deducted from the organizers' wages upon advice to respondent by its counsel that the payments were of doubtful legality (R. 258, 350, 351, 892, 930, 1091, 1092).

The details of organization of the Independent were likewise arranged under respondent's supervision. Responsible officials of respondent addressed a meeting at which the details were considered and gave plentiful advice (R. 1172, 511, 560, 891, 915). Falk urged haste in formation of the new organization and insisted that it be incorporated (R. 1172, 511-512, 611, 612, 835, 1012-1013). An attorney was deemed necessary (R. 1172, 321, 877); upon request, Falk recommended a few and made an appointment with one for a committee of the men (R. 1172-1173, 80, 84-85, 284, 321-322).^{*} Under the guidance of this attorney, the Independent was incorporated in accordance with Falk's demand, although incorporation had been rejected both by the committee of organizers and by the rank and file at the first organizational meeting (R. 1173-1174, 350-353, 859-860).

Respondent precipitately accorded the Independent exclusive recognition. On April 20, the Independent guardedly claimed 400 members out of the 1,500 employees (R. 1174, 1092, 860); yet 3 days later respondent recognized it as the exclusive bargaining agency in the plant without requesting or receiving any proof of majority repre-

^{*}The organizers attempted to conceal from the other employees the manner in which Burke, the attorney, was engaged (R. 1173, 561, 328).

sentation (R. 1174, 860, 892, 894, 1091, 1092).⁹

However, respondent set out to build up a majority for the Independent by a campaign of coercion directed against the two "outside" unions and in favor of the Independent. On company time and property high supervisory employees bitterly disparaged the Amalgamated and compared it unfavorably with the Independent; at least one even openly solicited on behalf of the Independent (R. 1174, 688, 689, 691, 237-241, 478-480, 485, 255-257, 260, 103, 904, 906, 685-686). And Falk, through a series of grossly coercive interviews with the powerhouse employees, effectively destroyed the majority there claimed by the Operating Engineers (R. 1174-1175, 638, 641, 159, 140-146, 1090, 75, 148, 641, 642-644, 654-655).

The evidence thus established that, after maintaining the Works Council until April 1937, respondent abandoned that method of denying to its employees freedom of choice of collective bargain-

⁹ Respondent's alacrity to recognize the Independent contrasts sharply with Falk's response to a request by the Operating Engineers for bargaining rights. On April 12, when the Independent was first being launched, the Operating Engineers claimed signed membership cards from 14 of the 17 powerhouse employees; Falk first demanded a list of the members (R. 660, 641) and then called the men in to canvass their desires (R. 140, 144). Falk then refused to recognize the Engineers, informing the employees by letter that "We are not in favor of a union" (R. 146, 1090, 1091).

ing representatives only to substitute another method no less effective. The Independent's existence is entirely ascribable to respondent's initiative. Having caused the Independent to be established, respondent led the employees, by bribes, threats, and illegal use of the powerful weapon of recognition, away from the *bona fide* labor unions and into the Independent.

These facts fully support the Board's findings (R. 1179-1180), that respondent dominated and interfered with the formation of the Association, was dominating and interfering with its administration, and was contributing support to it, in violation of Section 8 (2) and (1) of the Act. The Board ordered respondent to cease and desist from these unfair labor practices, to withdraw recognition from the Independent as a representative of any of its employees for purposes of collective bargaining, completely to disestablish the Independent as such representative, and to post appropriate notices (R. 1180-1181).

In the representation proceeding under Section 9, the Board found that a question had arisen concerning the representation of respondent's employees (R. 1178). The Board directed that, as part of the investigation to ascertain representatives for collective bargaining, an election be held, upon further order of the Board "after we are satisfied that the effects of respondent's unfair labor practices have been dissipated by compliance with this order"; and that the Amalgamated and the Operat-

ing Engineers, but not the Independent, appear on the ballot (R. 1178, 1181-1182).

On June 30, 1938, the Board filed in the court below, pursuant to Section 10 (e), its petition for enforcement of the order in the unfair labor practice proceeding (R. 1-5). On March 7, 1939, the court handed down an opinion (R. 1198) holding that the Board's findings of fact were supported by the evidence, and concluding that "the order of the Board is valid and that its petition for enforcement should be, and is hereby, granted" (R. 1206). On the same day the court entered an order for enforcement (R. 1207).

Thereafter the court submitted to the parties a proposed decree which modified the Board's order in substantial respects. The Board filed objections and a supporting memorandum, but on July 13, 1939, a majority of the court, after oral argument, adopted and entered the proposed decree (R. 1210-1211, 1212-1214). In addition to requiring that respondent cease and desist from its violations of Section 8 (1) and (2) of the Act, the decree provides as follows (R. 1210-1211, 1213-1214), the italicized matter representing the important provisions added to the Board's order (R. 1181-1182):

It is further ordered that said respondent withdraw recognition of the Independent Union as the representative of all or any of its employees for the purpose of dealing with it, the respondent, concerning grievances, labor disputes, wages or rates of pay, hours of employment, and other conditions of em-

employment of labor; provided, however, that the said employees shall remain free to choose at the coming election, or any future election held or conducted pursuant to the provisions of the N. L. R. Act, the Independent Union to represent them in labor-relation dealings with respondent; and provided further, however, that the said employees be uninfluenced or coerced in said election by the said respondent and that the respondent refrain from exercising any influence or coercion over the employees in their selection of said Independent Union.

It is further ordered that the respondent shall post notices in conspicuous places throughout its Milwaukee plant and maintain such notices for a period of thirty consecutive days stating that the respondent will and does withdraw recognition of the Independent Union of Falk Employees as representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages or rates of pay, hours of employment and other conditions of employment, and that it has, and does, completely disestablish such labor organization as such representative, and that it will not recognize it until and unless its said employees freely and of their own choice select the Independent Union as their representative to so deal with said respondent concerning said labor disputes.

It is further ordered that this court, by this order, is not approving, nor is it disap-

proving the direction of the National Labor Relations Board in reference to a coming or possible election by employees to choose their bargaining agency; and this order is not to be construed as approving any future action which does not place upon the ballot the names of all labor agencies or unions which are seeking the votes of the employees to represent them in collective bargaining with respondent over labor disputes, wages, etc.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred:

1. In holding that it had jurisdiction so to modify the Board's order under Section 10 as to invalidate or modify the direction of election which the Board had issued under Section 9 (c).

2. In holding that the Board had acted unlawfully in directing an election to be held omitting the Independent from the ballot.

3. In providing in its order that respondent's employees shall remain free to choose the Independent as their bargaining agency at any future election held pursuant to the Act.

4. In omitting from its order the provision of the Board's order that the notices posted by respondent include a statement that the respondent "will cease and desist" from the practices forbidden by the cease and desist portion of the order.

5. In refusing to enforce the affirmative provisions of the Board's order as issued by the Board.¹⁹

SUMMARY OF ARGUMENT

I

The court below had no jurisdiction to review the Board's direction of election or to order that in any election held under the Act the employees shall be free to choose the Independent. The question whether the circuit courts of appeal have jurisdiction to review representation proceedings is before the Court in *National Labor Relations Board v. International Brotherhood of Electrical Workers*, No. 253, this Term, and in *American Federation of Labor v. National Labor Relations Board*, No. 70, this Term, and we show in our briefs in those cases that directions of elections are not reviewable at all, and that only a certification, the last step in a

¹⁹ It will be noted that the provision of the decree requiring the posting of notices (second paragraph, *supra*) omits the requirement contained in the Board's order that the notices state "that the respondent will cease and desist" from the practices forbidden by the cease and desist portion of the order (R. 1181), although the court had expressly upheld the validity of that provision over objection by respondent (R. 1205-1206). We do not think it necessary to argue the validity of the notices provision, which is in the form repeatedly enforced by this Court, but the omission should be corrected. Another modification for which no reason appears is the omission, from the first paragraph of the decree quoted *supra*, of the requirement (R. 1180) that respondent disestablish the Independent; that paragraph of the decree merely requires withdrawal of recognition from the Independent. This omission, too, should be corrected.

representation proceeding, can be reviewed, and then only as provided in Section 9 (d) of the Act. That section affords review only when an order in an unfair labor practice proceeding is based upon facts certified in a representation proceeding. Here the representation proceeding merely reached the stage of a direction of election, and there was no certification. Accordingly, Section 9 (d) is inapplicable.

That the court below did review the direction of election is plain from the necessary effect of its decree and from the intent stated in its opinion that its decree control the conduct of the election. But, even if the provisions of the decree concerning the conduct of the election could be construed as merely a condition upon enforcement of the Board's order in the unfair labor practice case, rather than as a modification of the direction of election, the court was without power so to condition its relief as to infringe upon the Board's discretionary and purely administrative power to conduct the election. *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373.

II

The court should have granted full enforcement to the provisions of the Board's order requiring respondent to withdraw recognition from and completely to disestablish the company dominated Independent as a bargaining representative of the employees. The importance of the company union as a means of denying to employees freedom to

choose their own bargaining representatives is apparent from labor relations history and was noted by this Court in *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515. The legislative history of the National Labor Relations Act shows that Congress was greatly concerned with the company dominated union and intended to eliminate that impediment to genuine collective bargaining. The simple and effective remedy of disestablishing the company dominated organization as a bargaining representative, founded upon the decision of this Court in *Texas and New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, was adopted by the Board, following established administrative precedent, and was approved by this Court in *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board v. Pacific Greyhound Lines, Inc.*, 303 U. S. 272; and *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240.

The instant case is a critical one in that it presents squarely the question whether the efficacy of the disestablishment remedy is to be maintained or whether that remedy is to be subjected to vitiating modifications by the circuit courts of appeals. The court below approved the Board's findings that the Independent was a company dominated labor organization, yet it modified the disestablishment order by providing that the Independent be made eligible for selection as a bargaining representative at any election thereafter to be conducted

among the employees by the Board. The modification was improper.

A. The Board has power to require the permanent disestablishment of a company-dominated labor organization. (1) The Independent is inevitably and permanently identified in the minds of the employees with respondent, which brought it into existence and established it as the employees' bargaining representative. An election in which the Independent appears upon the ballot will accordingly not permit a free choice ~~by~~ the employees uninfluenced by respondent. The temporary period of nonrecognition required by the court's decree cannot serve to terminate this situation. Even if respondent and the Independent will some day be disassociated in the minds of the employees, there is no practicable means of ascertaining when this has occurred. (2) The permanent disestablishment of employer-dominated labor organizations is necessary in order to avoid facilitating evasion of the Board's cease and desist orders. Continued domination and control of the old organizations can be more easily accomplished and is more difficult to detect than domination of a new organization. (3) No real restriction of the employees' choice is accomplished by permanent disestablishment of the Independent. Not only is it doubtful that any employees would freely choose the Independent, but, if so the restriction is in any event not a serious one since the employees are left free to create a new organization identical with the

old save for the exclusion of employer domination. If there is any restriction, it is outweighed by the probability that continuation of the Independent will materially interfere with the freedom of choice of all the employees. The company union device should not be resurrected because of a fancied or minor restriction upon a supposed group of employees.

B. Even if the Board lacks power to require permanent disestablishment, upon the theory that there is an ascertainable point at which the interference worked by respondent's violations of the Act would no longer influence the employees in any respect, the conditions imposed by the court are nevertheless improper. (1) The court could not assume that that point would be reached prior to the election ordered by the Board, so that the Independent could appear on the ballot without unfairly influencing the employees' choice. A considerable period, at least, would have to elapse before the point could be reached; it was not an abuse of discretion for the Board to determine that the employees should not be denied all opportunity to select a bargaining representative in the meantime. (2) The fragmentary disestablishment ordered by the court below cannot serve to recreate the freedom of choice which respondent destroyed and restoration of which the court must have assumed to accomplish in modifying the direction of election. The remedy does not bring home to the employees that the company dominated Independ-

ent is not a fit medium for collective bargaining and is not entitled to recognition as a free representative of employees. The employer is merely directed to forego all bargaining until the employees have vetoed for or against his choice.

The Court's modification of the simple and effective disestablishment remedy threatens to substitute for a clear principle of administration criteria which are not susceptible of orderly application. The Board's remedy in the present case did not constitute an abuse of discretion and the disestablishment order should have been enforced by the court below. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.

ARGUMENT

I

THE COURT BELOW HAD NO JURISDICTION TO REVIEW THE DIRECTION OF ELECTION OR TO ORDER THAT IN ANY ELECTION HELD UNDER THE ACT THE EMPLOYEES SHALL BE FREE TO CHOOSE THE INDEPENDENT UNION

The issues presented to the court below by the Board's petition for enforcement (R. 1-5) and respondent's answer (R. 6) were limited to the validity of the Board's order in the unfair labor practice proceeding under Section 10 and to the propriety of enforcing that order. The court confined its original opinion and decision (R. 1198-1206) to a determination of those issues, sustained the Board's findings and order and granted the petition for enforcement. In its subsequent opinion

(R. 1208-1212), however, the court reviewed the Board's direction of election in the representation proceeding under Section 9 (c), and its decree (R. 1212-1214), in addition to modifying the Board's order under Section 10 (*infra*, pp. 29-51), in effect modifies the direction of election and controls the Board's conduct of any future election.

We show under Point II that the court erred in modifying the Board's order under Section 10, and that, even if it had jurisdiction to do so, it should not have disturbed the direction of election. Here we submit that the court had no jurisdiction to review the direction of election or to enter its decree in regard to the conduct of the election or of any future election.

The pertinent provision of the court's decree is as follows, the italics being ours (R. 1213):

It is further ordered that said respondent withdraw recognition of the Independent Union as the representative of * * * any of its employees * * *; *provided, however, that the said employees shall remain free to choose at the coming election, or any future election held or conducted pursuant to the provisions of the N. L. R. Act, the Independent Union to represent them*
* * *

Although this provision is in form a part of the order modifying and enforcing the Board's order under Section 10, it is in substance a modification of the Board's direction of election, which provided

for a form of ballot that would not permit a vote for the Independent.¹¹ It is designed, moreover, to control the Board's conduct of any future election. So viewed, it is plainly void for lack of jurisdiction.

The question whether the circuit courts of appeals have jurisdiction to review a direction of election is before the Court in *National Labor Relations Board v. International Brotherhood of Electrical Workers*, No. 253, this Term. In our brief in that case, and also in our brief in *American Federation of Labor v. National Labor Relations Board*, No. 70, this Term, we show that the Act does not provide for a review of representation proceedings

¹¹ The intervenor's brief in opposition to the petition for certiorari argued (pp. 4, 5) that the direction of election did not "preclude the Independent from appearing on the ballot." However, in discussing the election it would direct, the Board said (R. 1179), in a portion of its decision which dealt with the representation proceeding: "In such election we shall make no provision for the designation of the Independent on the ballot." And the direction of election plainly excludes the Independent in providing (R. 1181-1182) for an election "(1) among the employees * * * exclusive of * * * powerhouse employees, and steam-driven locomotive crane operators * * * to determine whether or not they desire to be represented by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1528 * * * (2) among the powerhouse employees and steam-driven locomotive crane operators * * * to determine whether they desire to be represented by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 1528 * * * or by International Union of Operating Engineers, Local 311 * * * or by neither."

under Section 9, but indeed that Section 9 (d) precludes review of them, except in the single situation there provided where "facts certified" under Section 9 (c) are a basis for an order issued by the Board in an unfair labor practice case under Section 10 and that order is sought to be enforced or reviewed pursuant to Section 10 (e) or (f). Since the same showing is applicable to the question of jurisdiction in the instant case, we respectfully refer the Court to our briefs in those cases.¹²

Respondent and the intervenor contended in their briefs in opposition to the petition for certiorari, at pages 3-4 and 6, respectively, that the court below had jurisdiction under Section 9 (d) to review the direction of election, since the representation proceeding had been consolidated with the unfair labor practice proceeding for purposes of hearing before the Board (Bd. Ex. No. 2). But this contention cannot stand. Section 9 (d) provides:

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon *facts certified* following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, *such certification* and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon

¹² Copies of these briefs are being served upon the attorneys for the respondent and intervenor herein, respectively.

the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. [Italics supplied.]

In the instant case there were no "facts certified" in the representation proceeding; there was only a direction of an election to determine whether or not there should be a certification of representatives. Consequently, Section 9 (d) did not grant jurisdiction to the court below as contended.

The fact that the representation and unfair labor practice proceedings were consolidated as a matter of convenience for purposes of hearing before the Board, as permitted by Section 9 (c), cannot enlarge the express scope of Section 9 (d) and is therefore immaterial. In *Cupples Company Manufacturers v. National Labor Relations Board*, 103 F. (2d) 953, 955 (C. C. A. 8), where, as in the instant case, the Board had issued a direction of election under Section 9 (c) and an order under Section 10 after a consolidated hearing, but had issued no certification, the Circuit Court of Appeals for the Eighth Circuit held that it could not entertain an inquiry as to the validity of the direction of election, but could do so only as to the order under Section 10.

Respondent and the intervenor also contended in their briefs in opposition to the petition for certiorari, at pages 4-5 and 5-6, respectively, that the court below did not purport to review or modify the direction of election. They argued, in effect, that

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the provision (*supra*, p. 20) in the court's decree in regard to the conduct of "the coming election, or any future election" under the Act was made merely as a modification of the Board's order of disestablishment under Section 10.

In regard to the contention that the court below did not purport to review or modify the Board's direction of election, it is true that the last paragraph of the court's order provides (R. 1214):

It is further ordered that this court, by this order, is not approving nor is it disapproving the direction of the National Labor Relations Board in reference to a coming or possible election * * *

The paragraph then continues—

this order is not to be construed as approving any future action which does not place upon the ballot the names of all labor agencies or unions which are seeking the votes of the employees to represent them in collective bargaining with respondent over labor disputes, wages, etc.

It will be recalled that a prior provision of the order (set out *supra*, pp. 11-12) requires that the employees shall remain free to vote for the Independent at "the coming election, or any future election" conducted by the Board. In view of this unequivocal direction, it seems probable that the statement that the court is not approving or disapproving the direction of election means only that the court does not require that the Board hold

an election, that is, that the Board may abandon the representation proceeding if it chooses, but that if it persists in holding an election the Independent must have a place on the ballot. The only other possible interpretation of the statement is that it is inconsistent with the earlier paragraph of the order, and was inserted as an answer to the Board's contention in the court below, as here, that the court was improperly reviewing the direction of election. If the former interpretation be given the statement, the statement itself shows review of and modifies the Board's direction. If the latter interpretation be accepted as the true one, the court's characterization of its action cannot alter what it actually did.

The court's opinion (R. 1208-1210) on the Board's objections to the entry of the decree shows that the court in fact reviewed the direction of election in conjunction with its review of the Board's order under Section 10, and that the court intended that its decree should compel the Board, if it held an election, to provide a ballot which would enable the employees to vote for the Independent. The court stated in its opinion (R. 1209):

If we had nothing before us but the terms
of an election * * *, we would not act.

We are, however, not merely passing on
the terms of a contemplated or coming elec-

tion. We have much broader and comprehensive issues to deal with. * * *

* * * we have, in addition to ordering certain action by the employer (a disclaimer, so to speak) before us for final disposition, the matter of the selection of the bargaining agent. * * * we are passing upon the application of the Board for an order which deals with the selection of a bargaining agent and which, if we adopt the Board's position, proposes to eliminate for all time one of the candidates—the Independent Union. * * *

The court further stated (R. 1210) that the right of employees to choose their bargaining representative would not be—

free or unhampered when the employees are denied the right to select one of the agencies or candidates by forcing that agency off the ballot.

Any claim that these remarks were addressed merely to the Board's order under Section 10 and do not show a review of the direction of election under Section 9 (c), is opposed by the fact that "the selection of a bargaining agent" and "the ballot," referred to by the court, were issues only in the representation proceeding under Section 9 (c). The statement (R. 1179) in the Board's decision that "In such election we shall make no provision for the designation of the Independent on the ballot," relied on by the intervenor (Br. in Opp. pp. 4-5) as having been made in the proceeding

under Section 10, was plainly made solely in connection with the direction of election under Section 9 (c). (See footnote 11, p. 21, *supra*.)

Conclusive evidence that the court below reviewed the direction of election and intended its decree to compel the Board, if it held an election, to utilize a ballot which would enable the employees to vote for the Independent, and thus, in effect, intended that its decree should modify the direction of election, appears from the last paragraph of the court's opinion, as follows (R. 1210):

It is for this reason [i. e. that the Board's ballot would not afford a free choice as required by the Act] that *we have provided in the order that the coming election shall be * * * unhampered by any election order which eliminates as a contender one agency which has, apparently, substantial support among the employees. [Italics supplied.]*

In view of this interpretation of the decree by the court itself, it cannot be claimed that the decree may be construed merely as a modification of the Board's order requiring respondent to disestablish the Independent. The necessary and intended effect of the decree was to modify the Board's direction of election. In the absence of the direction of election, there would have been no occasion for the court even to have discussed the question of the form of ballot and the freedom of the employees to choose the Independent. See *National Labor Re-*

latics Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261; *National Labor Relations Board v. Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240.

Finally, respondent contended (Br. in opp., pp. 6-7) that, the record of the proceedings having been filed, the court had general equitable power to grant such relief as would best serve the purposes of the Act. Cf. *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364. This argument assumes that the provision in the court's decree in regard to the conduct of an election may be construed merely as a condition of enforcement of respondent's duty to withdraw recognition from the Independent, rather than as a modification of the direction of election. Even if the provision be so viewed, we submit that the court below exceeded its authority in making it. Assuming, *arguendo*, that the circuit courts of appeals, in their review of orders under Section 10, may in proper cases order enforcement upon conditions which they deem to be equitable, they "must act within the bounds of the statute and without intruding upon the administrative province." *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373. See also *Central Kentucky Gas Co. v. Railroad Commission of Kentucky*, 290 U. S. 264, 271-273. The decree of the court below, in prescribing that the employees shall be free to choose the Inde-

pendent in any election held by the Board, plainly infringes the Board's discretionary and purely administrative power to conduct the election pursuant to its own direction.

II

THE COURT BELOW ERRED IN MODIFYING THE WITHDRAWAL OF RECOGNITION AND DISESTABLISHMENT PROVISIONS OF THE BOARD'S ORDER

The issue on the merits is raised by the refusal of the court below to grant full enforcement to the provisions of the Board's order under Section 10 requiring respondent to withdraw all recognition from and completely to disestablish the company dominated Independent as a bargaining representative of the employees. It will be useful, as an introduction to the argument upon this issue, to review briefly the importance of the company union problem, the Congressional efforts to eliminate it, and the remedies adopted by administrative agencies and approved by the courts to give effect to the Congressional intent.

The dominant position occupied by the company union as a means of denying to employees freedom of choice in the selection of their bargaining representatives is a matter of common knowledge in our labor relations history.¹³ In *Virginian Rail-*

¹³ Company unions have long been used as a device to prevent genuine self-organization by giving to employees "the illusion of collective bargaining." Commons, John R., and Andrews, John B., *Principles of Labor Legislation* (4th ed.,

way Co. v. System Federation No. 40, 300 U. S. 515, this Court, referring particularly to experience on the railroads, took notice of the historical fact that (pp. 545-546):

* * *

a prolific source of dispute had been the maintenance by the railroads of

1936), pp. 409-410. Company unions "have interested a majority of the employers because of their potentialities in combating unionism." Lescobier, Don D., *History of Labor in the United States, 1896-1932* (1935), Vol. III, p. 354. The authorities are almost unanimous in agreeing that the company union cannot serve as a genuine collective-bargaining representative and that its primary function is to oppose and destroy "outside" unions. Tead, Ordway, and Metcalf, Henry C., *Personnel Administration* (1933), pp. 430 *et seq.*; Fitch, John A., *The Causes of Industrial Unrest* (1924), pp. 147 *et seq.*; Yoder, Dale, *Labor Economics and Labor Problems* (1939), pp. 602 *et seq.*; Watkins, Gordon S., *Labor Problems* (1935), pp. 628 *et seq.*; Brooks, Robert R. R., *Unions of Their Own Choosing* (1939), pp. 68 *et seq.*; Daugherty, Carroll R., *Labor Problems in American Industry* (rev. ed., 1938), pp. 645 *et seq.*; Witte, E., *The Government in Labor Disputes* (1932), p. 218. The exhaustive study of company unions made by the Bureau of Labor Statistics, United States Department of Labor, concludes with this statement:

"Examination of a representative group of 126 company unions indicates that their establishment was most frequently due to the pressure of trade union activity either in the form of organization drives or strikes in the trade or vicinity. Legislation and other governmental action was also an important factor. Few company unions were set up in the absence of such external influences."

U. S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Company Unions*, Bulletin No. 634 (1935), p. 1938. It was estimated in 1935 that some 2,500,000 employees were organized in "inside" unions. Twentieth Century Fund, *Labor and the Government* (1935), p. 79.

company unions and the denial by railway management of the authority of representatives chosen by their employees. Report of House Committee on Interstate and Foreign Commerce, No. 1944, 73rd Cong., 2d Sess., pp. 1-2.

The company union problem was in the forefront of congressional attention when Congress enacted the National Labor Relations Act in 1935.¹⁴ The Report of the House Committee on Labor (H. Rept. No. 1147, 74th Cong., 1st Sess., pp. 17-19) places great emphasis upon the company union evil, and dwells at length upon the extensive development of such organizations subsequent to the enactment of the National Industrial Recovery Act. It points out that about 70 percent of the company unions then in existence were established after that statute was passed, that they "were a primary or attendant cause of the disputes in about 30 percent of the cases heard by" the first National

¹⁴ In both the Norris-LaGuardia Act passed in 1932, and the National Industrial Recovery Act, passed in 1933, Congress had addressed itself to the problem of the company union. In the former (Act of March 23, 1932, 47 Stat. 70) Congress declared that employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of" collective bargaining representatives. In the latter (Act of June 16, 1933, 48 Stat. 198) Congress inserted the same provisions in Section 7 (a) and added an express restraint against requiring any employee "to join any company union." See also the 1933 amendments to the Bankruptcy Act (47 Stat. 1481, U. S. C., Title 11, Sec. 205 (p) and (q)).

Labor Relations Board, and that most company unions "had become active in contemplation of or contemporaneously with a trade-union organizing movement." The Committee declared the purpose of the National Labor Relations Act in this regard as follows (p. 17):

It is of the essence that the right of employees to self-organization and to join or assist labor organizations should not be reduced to a mockery by the imposition of employer-controlled labor organizations, particularly where such organizations are limited to the employees of the particular employer and have no potential economic strength.¹⁵

These facts are fully set out in the opinion in *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 266-268.

A problem so important to the protection of the freedom of employees in self-organization and designation of their representatives for collective bargaining plainly demanded preventive and remedial measures which would be effective. The model was supplied by the landmark decision of this Court in *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548. In that case the district court, upon a bill alleging that the carrier was interfering with the freedom

¹⁵To the same effect, see the Report of the Senate Committee on Education and Labor (S. Rept. No. 573, 74th Cong., 1st Sess., pp. 9-10).

of its employees to choose their representatives, entered a temporary injunction closely following the language of the Railway Labor Act (24 F. (2d) 426, 427). Thereafter the district court found that, among other respects, the carrier had committed contempt in recognizing a company union as the representative of the employees. To remedy this violation of the injunction decree, the court directed the carrier completely to "disestablish the Association * * *" as it was then constituted as the recognized representative of the clerical employees" of the carrier (281 U. S. at 557). This Court sustained the ruling below in full, declining to accept the claim "that the decree below goes beyond the proper enforcement of the provision of the Railway Labor Act" (281 U. S. at 571).

The affirmative remedy thus judicially approved in the *Texas & New Orleans* case has received well-nigh universal acceptance. It was uniformly applied by the first National Labor Relations Board when it found that an employer had violated Section 7 (a) of the Recovery Act by fostering, dominating, or supporting a labor organization of his employees.¹⁶ The Petroleum Labor Policy Board made similar orders in two cases.¹⁷

¹⁶ *Matter of Stahl-Urban Co.*, 2 N. L. R. B. (old) 149 (1935); *Matter of Procter & Gamble Mfg. Co.*, *ibid.*, p. 192 (1935); *Matter of Universal Folding Box Co.*, *ibid.*, p. 284 (1935); *Matter of Standard Tailoring Co.*, *ibid.*, p. 422 (1935); *Matter of National Battery Co.*, *ibid.*, p. 484 (1935). Cf. *Matter of North Carolina Granite Corp.*, 1 N. L. R. B. (old) 89 (1934); *Matter of Danbury & Bethel Fur Co.*, *ibid.*,

This judicial and administrative treatment of a pressing problem was known to and approved by Congress in enacting the National Labor Relations Act. As pointed out in this Court's decision in the *Pennsylvania Greyhound* case (303 U. S. at 267):

In recommending the adoption of this latter provision the Senate Committee called attention to the decree which, in the *Railway Clerks* case, had compelled the employer to "disestablish its company union as representative of its employees." Report of the Senate Committee on Education and Labor, *supra*. The report of the House Committee on Labor on this feature of the Act, after pointing out that collective bargaining is "a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals," declared: "The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, *refraining from bargaining with an organization corrupted by unfair labor practices.*" Report of the House Committee on Labor, *supra*, pp. 18, 24. [Italics supplied.]

p. 195 (1934); *Matter of Samson Tire & Rubber Corp.*, 2 N. L. R. B. (old) 499 (1935).

¹⁷ *Matter of the Texas Co.*, Decisions of the Petroleum Labor Policy Board, p. 29 (1934); *Matter of Keener Oil and Gas Co.*, *ibid.*, p. 53 (1935).

Consistently with this clear Congressional intention that disestablishment should be a normal remedy for violations of Section 8 (2) of the Act, it has been uniformly ordered by the Board upon findings of such violation.¹⁸ In the three cases involving such an order decided by this Court, this remedy has been approved and enforced. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board v. Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240.¹⁹ The appropriateness of the remedy has likewise received widespread recognition from the various circuit courts of appeals.²⁰

It is in this setting that the instant case falls. Experience has shown and Congress and this Court

¹⁸ Disestablishment has been ordered by the Board in more than 300 cases.

¹⁹ The question is again before the Court in *National Labor Relations Board v. Newport News Shipbuilding & Drydock Co.*, No. 20, this Term, argued and pending decision.

²⁰ *National Labor Relations Board v. Ronni Parfum, Inc.*, 104 F. (2d) 1017 (C. C. A. 2); *National Labor Relations Board v. American Mfg. Co.*, 106 F. (2d) 61 (C. C. A. 2); *National Labor Relations Board v. National Licorice Co.*, 104 F. (2d) 655 (C. C. A. 2), certiorari granted, October 9, 1939; *National Labor Relations Board v. Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3), certiorari denied, November 6, 1939; *Republic Steel Corp. v. National Labor Relations Board*, decided November 8, 1939 (C. C. A. 3); *Titan Metal Mfg. Co. v. National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3); *National Labor Relations Board v. Griswold Mfg. Co.*, 106 F. (2d) 713 (C. C.

have recognized that company dominated unions are incompatible with the freedom of choice guaranteed in the Act to employees; that such organizations present one of the most potent forms of the prohibited interference; and that where found to exist, the appropriate measure to eliminate such organizations from the collective bargaining field is the disestablishment order. The action of the

A. 3); *National Labor Relations Board v. J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4); *National Labor Relations Board v. Wallace Mfg. Co., Inc.*, 95 F. (2d) 818 (C. C. A. 4); *National Labor Relations Board v. Eagle Mfg. Co.*, 99 F. (2d) 930 (C. C. A. 4); *Virginia Ferry Corp. v. National Labor Relations Board*, 101 F. (2d) 103 (C. C. A. 4); *National Labor Relations Board v. Colten et al.*, 105 F. (2d) 179 (C. C. A. 6); *Cudahy Packing Co. v. National Labor Relations Board*, 102 F. (2d) 745 (C. C. A. 8), certiorari denied, October 9, 1939; *Hamilton-Brown Shoe Co. v. National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8); *National Labor Relations Board v. Lund*, 103 F. (2d) 815 (C. C. A. 8); *Wilson & Co., Inc. v. National Labor Relations Board*, 103 F. (2d) 243 (C. C. A. 8); *National Labor Relations Board v. American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9), certiorari denied, 306 U. S. 643; *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), certiorari denied, 304 U. S. 575; 99 F. (2d) 533 (C. C. A. 9), certiorari denied, 306 U. S. 646; *Swift & Co. v. National Labor Relations Board*, 106 F. (2d) 87 (C. C. A. 10).

Contra: National Labor Relations Board v. Newport News Shipbuilding & Drydock Co., 101 F. (2d) 841 (C. C. A. 4), argued and pending decision, No. 20, this Term; *National Labor Relations Board v. Bradford Dyeing Ass'n*, 106 F. (2d) 119 (C. C. A. 1). The Board will file a petition for certiorari in the *Bradford Dyeing* case.

court below not only overrules the decision of the administrative body, but is in conflict with long industrial experience, with the deliberate judgment of Congress based upon that experience, expressed in the Act and its legislative history, and with the decisions of this Court.

In the present case, the Board's findings that respondent dominated and interfered with the formation and administration of the Independent and had contributed support to that organization, in violation of Section 8 (2) of the Act, were fully supported by the evidence (*supra*, pp. 5-10) and were approved by the court (R. 1198-1206). On those findings, the court should have enforced the affirmative provisions of the Board's order without modification unless those provisions constituted an abuse of the Board's judgment or discretion in determining the particular relief appropriate in the circumstances. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *National Labor Relations Board v. Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240. Instead, the court modified the order by providing that the Independent shall remain eligible for selection as a bargaining representative and by adding to the notices which respondent was directed to post an announcement that respondent would again accord recog-

nition to the Independent if it were selected by the employees in the election directed by the Board.²¹

The court placed its modification squarely upon the theory that, while the provisions for disestablishment and withdrawal of recognition were proper, the employees nevertheless must be permitted to select the disestablished organization as their representative in the election directed by the Board. We submit that the court erred. The Board's requirement that respondent withdraw recognition from the Independent as a bargaining representative of the employees was essential to establishment of a free choice and thus to effectuate the policies of the Act. The Board should not be obliged at the same time to undo this remedy by placing the company-dominated organization on the ballot. Such action would frustrate the whole purpose of the election: to permit a choice free from the effects of employer interference.

A. THE BOARD HAS POWER TO ORDER THE PERMANENT DISESTABLISHMENT OF AN EMPLOYER DOMINATED UNION

Full enforcement of the remedy approved by this Court in the *Greyhound* cases and the *Fansteel*

²¹ We shall assume, for purposes of the discussion, that the court below enforced the disestablishment provisions of the Board's order, subject to the conditions imposed. In fact, however, only the provision (paragraph 2 (b) (2), R-1181) requiring the posting of notices announcing the disestablishment was enforced; the provision of paragraph 2 (a) (R. 1180), requiring respondent to disestablish the Independent as a bargaining representative, was omitted from the court's decree, which was confined to requiring withdrawal of recognition (R. 1213; *supra*, pp. 11-12).

case, *supra*, is indispensable if there are to be created in respondent's plant conditions for the freedom of choice which the Act guarantees but which respondent's employees were precluded from enjoying by the establishment of the company dominated and supported Independent at the very moment when that freedom appeared to be imminent. In the *Greyhound* cases, this Court recognized the validity of the Board's conclusion that the effects of employer domination and interference normally continue of their own momentum long after the violations themselves have ceased (303 U. S. at 270, 275). Similarly, in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, the Court said (at p. 236):

The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair labor practices.

1. *The attitude of the employees toward a union which has been employer dominated will probably never be wholly free from employer influence*

The court below in the present case imposed conditions upon the disestablishment remedy which destroy its efficacy. It held that, after a period during which the Independent is to be under a disability to serve as a bargaining representative, it is again to be put forward for selection by the

employees. Its further functioning as a bargaining representative is temporarily suspended but not permanently terminated. This holding appears to be based upon the same premise which was advanced against the disestablishment provisions of the Board's orders in the *Greyhound* and *Fansteel* cases, that is, that a labor organization which, like the Independent, has been formed at the instigation of the employer, has been dominated and supported by the employer throughout its history, has been used as an instrument to prevent freedom of choice by the employees, and has achieved its membership and position as a result of these unfair labor practices, may be freely chosen by the employees when the violations of law which brought it into existence and enabled it to achieve an exclusive bargaining status have ceased. We submit that this premise is not tenable.

The consequence of violations of Section 8 (2), such as those in which respondent engaged, is the existence of a company dominated and supported labor organization and the adherence of employees to it. Such an organization itself inevitably stands in the minds of the employees as the candidate of the employer, an attribute which it gained by reason of the employer's unfair labor practices, and that position necessarily precludes it from a place on the ballot and requires its complete and permanent disestablishment as a bargaining representative of the employees.

It is no answer that here the court has required a period of nonrecognition and suspension of bargaining relations, a period to be terminated by the votes of the employees who have been subjected to the interference, whereas in the *Greyhound* and *Fanstel* cases the lower courts refused to order any withdrawal of recognition. This distinction, too, necessarily assumes that at some point the employees will cease to regard the Independent as respondent's handiwork and that respondent's interference and domination will thereupon cease to influence their choice. It is far more likely that the Independent, in the minds of the employees, will always be identified with the management which called it into existence and coerced the employees to join it, and that the employees will regard any renewed entrance by the Independent into the competition for recognition as a reentry of respondent's candidate. The Independent is a symbol of respondent's active opposition to efforts by its employees to exercise the rights guaranteed in the Act. It has been used to defeat such efforts. The Board has the right to conclude that the employees will continue, as they have in the past, to regard the Independent as an organization which is identified with respondent.

Moreover, if a formerly employer-dominated organization—here the Independent—is permitted to continue to compete for membership of the employees and for status as their bargaining representative, it may be expected to retain the same

structure, policies, and officials the choice of which would in most cases, as here (see *supra*, pp. 5-10), have been decisively influenced by the employer and shaped with an eye to his approval. The continuance of these characteristics would enhance the identification of the employer and the organization in the minds of the employees. Further, the officers who would continue in control would normally have been the particular instrumentalities and agents of company domination. In an election with such an organization on the ballot the employees would clearly not have the freedom of choice which the Act guarantees.

Even if it could be assumed that, at some time, employees will no longer be influenced in their choice of bargaining representatives by their employer's former domination of a labor organization, denial to the Board of power to order permanent disestablishment would impose upon it the virtually impossible task of determining when the interference had ceased to have any effect. It cannot now be challenged that employer domination and support of a labor organization subject the employees to compulsions; this nexus has been repeatedly discerned by the Court (*supra*, pp. 29-34), is the entire foundation of the second unfair labor practice proscribed by the Act, and can be readily verified in experience. The Board need not, therefore, receive proof in each case that the compulsions have been engendered. But there are no such

aids in determining that employees have ceased to regard a company dominated organization as their employer's candidate. Such a determination would necessarily be speculative. The Board should not be required to permit company sponsored labor organizations, which were a prime object against which the Act was directed, to resume operations upon the Board's guess that they will not prove harmful. Rather, the Board should be permitted to avoid the necessity of such speculation.

2. *Continued domination of a union by an employer who formerly dominated it would be easy, yet difficult of detection*

Thus far we have assumed *bona fide* employer compliance with the Board's cease and desist order. Upon this assumption, as has been stated, the necessity for the complete and permanent disestablishment of formerly employer dominated organizations stems from the inability to eradicate, by means of a cease and desist order, the results of employer domination. In addition, if the old organization is permitted to continue, violation of the cease and desist order is markedly facilitated. An employer bent upon further domination and control could more easily effect and conceal such control of the old organization, which was designed and officered in accordance with his wishes, than he could of a new organization created subsequent to

the cease and desist order and without the employer's participation. It would be difficult, as an evidentiary matter, to lay at the door of the employer that intangible but easily sensed subservience to him resulting from a history of domination. On the other hand, more obvious and hence more easily detected forms of interference would be necessary to dominate and control a new organization. That feasible policing and enforcement of a law sometimes warrant prohibitions not otherwise justifiable has been recognized by the Court. See *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201-205; *Booth v. Illinois*, 184 U. S. 425, 429-430; *Silz v. Hesterberg*, 211 U. S. 31.

3. *Any possible restriction on employee choice resulting from permanent disestablishment is slight compared with the advantages of the remedy*

The sole contention advanced against the propriety of complete and permanent disestablishment is a claim that freedom of choice may be restricted because some employees may freely desire the Independent. It is true that those hypothetical employees who may desire to be represented by the Independent and who may have remained uninfluenced by the unfair labor practices, or who may assert that they have cast off such influence during the period of nonrecognition, are denied the Independent. Assuming the existence of such employees and the possible restriction on an absolutely free choice by them, it is apparent

that the restriction is not a serious one. Those employees who desire an unaffiliated organization are free to form a new union. Indeed, an insistence by some of the employees upon resurrection of the discredited and disestablished Independent in preference to pursuing the ready alternative of choosing other representatives, suggests that their purpose is to retain the advantages of prestige and position vested by the employer in the beneficiary of its interference and support, and thus that the direction of their choice is a result of the employer's illegal acts, designed to produce that very result.

If a slight restriction is effected, however, it is outweighed by the probability, which lies at the very basis of the disestablishment order, that other employees will be heavily influenced by the history of the Independent and by their consequent knowledge that that organization is the employer's candidate. The restriction, if one exists, is thus necessary to the accomplishment of one of the Act's chief purposes—the elimination of company dominated unions—by maintaining in full the efficacy of the important disestablishment remedy. If company unions are permitted to resume their functioning in order to preserve a completely unrestricted choice by a supposed group of employees, whose will is assumed to be free despite the existence of compulsion established in common experience and presumed by the Act, this device may well become

again an outstanding means of denying to employees all freedom of choice. In sum, the modification of the Board's order made by the court below would encourage violations of Section 8 (2), for, notwithstanding such violations, the existence of the company dominated organization is carefully preserved for the purposes—illegal under the Act—which brought it into existence.

B. EVEN IF THE BOARD CANNOT ORDER PERMANENT DISESTABLISHMENT, THE CONDITIONS IMPOSED BY THE COURT ARE UNREASONABLE

Under heading A we argued that the Board has power to require the permanent disestablishment of an employer dominated labor organization. Under the present point we assume, *arguendo*, that the Board could not reasonably impose such a requirement because, contrary to what we believe the fact to be, there is a point at which the interference worked by prior violations of Section 8 (2) would no longer influence the employees even if the organization which was the object of the interference and domination were placed on the ballot. Even upon such an assumption, the order of the court below is improper.

1. *The court could not properly assume that, by the time of the election, the Independent could appear on the ballot without unfairly influencing the employees' choice*

Even were it possible for the Board to determine, upon sufficient evidence, that a labor organization formerly dominated by the employer should

be eligible for selection as a bargaining representative because the effects of the interference worked by the violations of Section 8 (2) have been completely dissipated, the court below could not properly assume that such a finding would be appropriate in this case prior to the election directed by the Board

Such an assumption could not be based upon the fact that the Board directed the election to be held "upon our further order after we are satisfied that the effects of the respondent's unfair labor practices have been dissipated by compliance with this order" (R. 1179). These words were part of the provision for an election without the Independent on the ballot. The Board's clear intent was that such an election be held when the employees were enabled, through respondent's compliance with the disestablishment and other provisions of the order, to exercise a free choice for or against, or between, organizations other than the Independent. Respondent's illegal interference was designed to coerce the employees to select the Independent as their bargaining representative. There is a readily perceptible distinction between the effect of such interference in an election participated in by the Independent, so that the employees again have an opportunity to do exactly what respondent has in the past coerced them to do, and its effect in an election without respondent's favorite as a candidate.

If we are wrong in thinking that a fair election of the first type could never be held among respondent's employees, it is, at least, clear that a considerable period of time would have to pass before such an election would be possible. It certainly was not an abuse of discretion for the Board to determine that the employees should not indefinitely be denied all opportunity to select a representative—with the consequent postponement of the collective bargaining which the Act fosters—until a determination can be made, if it ever can, that respondent's sponsorship of the Independent will not influence an election in which that organization participates.

2. *The conditional disestablishment ordered by the court cannot serve to recreate freedom of choice by respondent's employees*

Still, assuming that there may be circumstances under which effectual remedying of the Section 8 (2) violations will permit the employees to exercise a free choice between a formerly company sponsored organization and a *bona fide* labor union, the order of the court below is self-contradictory in that the relief framed by the court will not serve to create conditions for such a choice, although the court requires that the choice be made. The fragmentary disestablishment ordered by the court below cannot serve to restore the freedom which respondent has destroyed. In fact, the

court's remedy negatives the meaning of disestablishment and effectively withholds what it pretends to grant.

An effort to overcome the effects of employer domination of a labor organization can succeed only if it is brought home to the employees that, because of the employer's sponsorship, the organization is not a fit medium for collective bargaining and is not entitled to recognition for what it is not—a free and independent representative of employees. Cf. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271. The order of the court cannot transmit that message. This disqualification which it imposes is conditioned upon the employees' repudiation of the Independent in an election and the notices, as modified by the court, expressly inform the employees that respondent will again recognize the Independent if it is chosen in the election. There is no disavowal of the organization, no turning of the employer's face from the fruits of his illegal acts. If an employer voluntarily ceased his flagrant violations of Section 8 (2) and announced that he would bargain neither with his favorite *nor with any other organization* until the employees voted for or against his choice, it could not be contended with reason that effective steps had been taken to undo the results of the violations. There is no reason to suppose that this action will be more effective to achieve the purposes

of the Act merely because it is undertaken upon order of the court.

These and related difficulties arising from the modifications made by the court below pose a serious problem to the Board in the administration of the Act. The Board has applied the disestablishment remedy in hundreds of cases, and has done so because violations of Section 8 (2) interfere with and canalize the desires of the employees, as the Congress found. The decision of the court below substitutes for these clear principles of administration criteria which are not susceptible of orderly application. These criteria, applicable in principle in all cases whether or not elections are simultaneously pending, require the Board to speculate, from the different circumstances of each case, whether the effects of the employer's unfair labor practices have been dissipated. The simple and effective disestablishment remedy consistently ordered by the Board is appropriate to remove the effects of employer domination and interference and to recreate the freedom of choice upon which genuine collective bargaining depends. It merely removes that which was unlawfully brought into being. The remedy was appropriate to the facts of the case and the problem dealt with, and was not unreasonable or arbitrary. It should, therefore, be granted enforcement. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265.

CONCLUSION

It is respectfully submitted that the decision of the court below, insofar as it modified the order of the Board, should be reversed, and the cause remanded with directions to grant the order full enforcement.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 158 *et seq.*) are as follows:

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * *
SEC. 9.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. * * *

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or, if all

the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

